

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL
PROOF
SERVICE

77-7069

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BALLON, STOLL & ITZLER,

Plaintiff-Appellant,

-against-

THOMAS J. DUFFEY, HERMAN A. LUEKING, JR.,
ALBERT D. MATHESON, WILLIAM J. KENNEDY,
JOHN A. MURPHY, JACK A. SHEETZ, JOHN
SPICKERMAN, FRANK E. FITZSIMMONS, ROBERT
HOLMES, DONALD PETERS, WILLIAM PRESSLER,
ODELL SMITH, ROY L. WILLIAMS, FRANK H.
RANNEY, and JOSEPH MORGAN, Not Individually
But as Trustees Under a Common Law Trust of the
Central States Southeast and Southwest Areas Pen-
sion Fund,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

BALLON, STOLL & ITZLER
Attorneys for Plaintiff-Appellant
1180 Avenue of the Americas
New York, New York 10036
(212) 575-7900

PHILIP SHERWOOD GREENHAUS
of Counsel

(6129B)

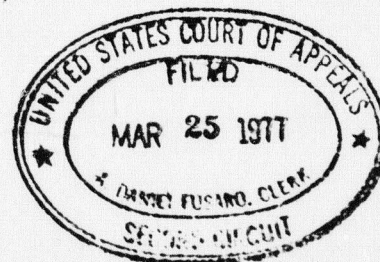


TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT	1
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE	3
A. The Meeting of November 5, 1969	5
B. The Meeting of November 11, 1969	8
C. The Meeting of November 19, 1969	8
D. The Chapter XI Proceeding Continues - The Fund's Involvement	9
E. Collateral Matters Not Affecting the Chapter XI Proceeding	12
F. Resolution of the IRS Claim	12
G. Resolution of Claims of General Unsecured Creditors	13
H. The Fund Breaches the Contract to Advance Final Monies - Confirmation Fails	14
 ARGUMENT	
I. THE DISTRICT COURT'S HOLDING, THAT THE SEVERAL TRUSTEES AND THEIR ATTOR- NEYS WITH WHOM PLAINTIFF ENTERED INTO CONTRACT LACKED THE REQUISITE AUTHO- RITY TO BIND THE FUND, IS CONTRARY TO, AND CONTRADICTED BY THE FACTS AND INDEED THE TRIAL COURT'S OWN FINDINGS OF FACT	16
II. THE DISTRICT COURT'S HOLDING, THAT THE FUND WAS NOT OBLIGATED TO FURNISH FUNDS NECESSARY TO CONFIRM AN ARRANGE- MENT FOR NEISCO, INCLUDING PAYMENT OF	

PAGE

BSI'S LEGAL FEES, IRRESPECTIVE OF THE FUND'S NEGOTIATIONS WITH THE HORVATHS, IS NOT SUPPORTED BY THE FACTS	26
A. The Fund Was Contractually Obligated to Furnish Monies Required to Confirm the Neisco Arrangement	28
B. The Fund's Contractual Obliga- tion to Furnish Monies Required to Confirm the Neisco Arrangement Was Not Dependent Upon Resolution of "Other" Matters.....	39
1. Ballon's Testimony	39
2. Itzler's Testimony	43
3. Polish's Testimony	46
4. Testimony Adduced by BSI from Fund Records and Fund Witnesses.....	50
III. THE DISTRICT COURT FAILED TO DRAW INFERENCES AGAINST THE FUND BASED UPON THE FUND'S FAILURE TO CALL WITNESSES LIKELY TO SUPPORT THE FUND'S POSITIONS	54
IV. THE FUND'S UNWARRANTED REFUSAL TO HONOR ITS CONTRACTUAL OBLIGATION TO PROVIDE MONIES NECESSARY TO ENABLE PLAINTIFF TO CONSUMMATE A CHAPTER XI PROCEEDING DISPENSED WITH PLAINTIFF'S OBLIGATION, AS A CONDITION PRECEDENT TO PAYMENT, TO CONSUMMATE A CHAPTER XI PROCEEDING	56
CONCLUSION	60

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
Allen v Hyland, 30 Misc 2d 632, 215 NYS 2d 587 (Supt Ct, Erie Cnty, 1961), affd App Div, 222 NYS 2d 1023 (1) (4th Dept, 1962, memo).....	58
Amies v Wesnofske, 255 NY 156, 174 NE 436	58
Gulf Oil Corp. v American Louisiana Pipe Line Company, 282 F 2d 401 (6th Cir 1960)	58
Imperator Realty Co. v Tull, 228 NY 447, 127 NE 263	59
Kooleraire Serv. & I. Corp. v Board of Education, 28 NY 2d 101, 268 NE 2d 782, 320 NYS 2d 46	58
Mansfield v N.Y.C. & H.R.R.R.C.O., 102 NY 205, 6 NE 386	57
Noce v Kaufman, 2 NY 2d 347, 141 NE 2d 529, 161 NYS 2d 1	55
Overton v New York City Housing Authority, AD 2d, 388 NYS 2d 598 (1st Dept, 1976)	54
Patterson v Meyerhofer, 204 NY 96, 97 NE 472	57

MISCELLANEOUS

5 Williston on Contracts, 3rd Edition, §677	58
---	----

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 77 - 7069

BALLON, STOLL & ITZLER,

Plaintiff-Appellant,

against

THOMAS J. DUFFEY, et al.,

Defendants-Appellees

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff BALLON, STOLL & ITZLER (BSI) appeals from a judgment (837a)* entered in the United States District Court for the Southern District of New York on January 13, 1977, pursuant to a memorandum opinion and

*References indicated by a number and an "a" are to pages of the Appendix. References indicated by a number and an "e" are to pages of the Exhibit Appendix.

order* (799a) of Judge Charles S. Haight, Jr., dated January 11, 1977, rendered after a non-jury trial, directing judgment for defendants against plaintiff and dismissing plaintiff's complaint.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in concluding that a contract was not entered into whereby defendants (the Fund) obligated itself to provide the monies to fund a Chapter XI proceeding, including the payment of attorney's fees, if BSI performed the following services:

- a. Settled the claims of general unsecured creditors for 15% or less;
- b. Resolved or had resolved the claim of the Internal Revenue Service (IRS); and
- c. Consummated the Chapter XI proceeding?

2. Did the District Court err in failing to conclude that the individual Trustees of the Fund, or their attorneys, with whom BSI was negotiating, had authority to bind the Fund?

3. Do the Conclusions of Law of the District Court, insofar as they relate to the above issues, accord with the District Court's Findings of Fact with respect to the above issues?

*not reported

STATEMENT OF THE CASE

George Horvath (Horvath) was the chief executive of Neisco, Inc. (Neisco), a New York corporation. Together with other members of his family, he was involved with a number of corporations affiliated with Neisco.

Defendants (the Fund) had, over a considerable period of time, loaned, through investment, a substantial sum of money to Neisco. By November of 1969, the indebtedness of Neisco to the Fund was approximately one to one and one-half million (\$1,000,000.00 - \$1,500,000.00) dollars (162a, 530a) and the total indebtedness of all affiliated corporations, including Neisco, was approximately twelve million (\$12,000,000.00) dollars (162a, 530-531a). In November, 1969, all these loans were in default (531a).

Horvath, desiring to obtain additional monies from the Fund by way of loans or advances to Neisco (162a), contacted Frederick E. M. Ballon (Ballon), the senior partner of plaintiff law firm, and requested that Ballon accompany him to a meeting of the Trustees of the Fund in Chicago.

A meeting was arranged and on November 5, 1969, a meeting with representatives of the Fund was held in the offices of Allen Dorfman (Dorfman). Dorfman was a special consultant to the Fund (141e). Present at the November 5, 1969 meeting, in addition to Ballon, Horvath and Dorfman, were: Joseph Radom (Radom), an attorney representing the Fund, authorized to take any steps necessary to protect the Fund's interests in Neisco (173-174e); Joseph Teitelbaum (Teitelbaum), an attorney who was retained by the Fund on various matters (144e), and who, like Radom, was authorized to take any steps necessary to protect the Fund's interests in Neisco; Albert D. Matheson (Matheson), an attorney who was a Trustee of the Fund (192e); Al Baron (Baron), an attorney retained by the Fund who was then devoting one hundred (100%) per cent. of his time to the Fund (145e); Thomas J. Duffey (Duffey), an attorney who was a Trustee of the Fund (136, 137e); Jack Polish (Polish), an attorney who represented Horvath and some of his companies in years preceding 1969 (681a); Mr. Peters, a Trustee of the Fund (529a); and, Mr. Weissner, an accountant (530a), present at the Fund's request.

The Trustees, prior to the November 5, 1969 meeting, had been advised, by their attorneys Radom and Teitelbaum,

that Neisco was in financial difficulty (149, 150e). This information had apparently been conveyed to the Trustees in August or September of 1969 (150e). Having invested substantial monies in Neisco and the related corporations, the Trustees, in the words of Matheson, "sat down to discuss what is the best way to protect our investment." (194e)* The record makes clear, beyond argument, that the Fund sought to protect its investments and preferred, irrespective of Horvath's desires, that a Chapter XI proceeding be instituted (644a; 205, 206e; 214, 215e). Clearly, the primary purpose of negotiations which commenced on November 5, 1969 was to design a Chapter XI proceeding for Neisco, for the benefit of the Fund. The actions with respect to the Chapter XI proceeding were engineered by and for the benefit of the Fund.

A. The Meeting of November 5, 1969

It was in the above setting that the November 5, 1969 meeting was held, attended by four or five Trustees of the Fund and by two Fund attorneys who "were authorized to do anything that was necessary to protect our interests in Neisco and the Chapter XI proceeding." (173-174e). Horvath,

*Matheson's testimony at the examination before trial is not clear as to when this discussion took place. Since he knew of the Neisco financial difficulties approximately six months prior to the Chapter XI proceeding (195e) (the Petition was filed in late November, 1969), it is assumed that the discussion took place prior to the meeting of November 5, 1969.

whose power would be greatly lessened if a Chapter XI proceeding was instituted, resisted the concept but, as the inevitable became obvious, acquiesced (804a).

Ballon was asked what was involved in a Chapter XI proceeding and he explained the procedure (174a). He testified that Matheson pointedly wanted to know what would be involved by way of funds necessary to be advanced by the Fund to consummate the Chapter XI proceeding which would be filed (174a).^{*} Ballon generally discussed what would be needed for general creditors as well as the IRS (176, 177a). In response to Matheson's inquiry, Ballon indicated that he thought he would be able to arrange a settlement with general unsecured creditors of fifteen (\$.15) cents on the dollar (176a) and Ballon further indicated that the IRS claim had to be resolved (177a). With particular respect to BSI's fee, Ballon stated that BSI could not undertake to file a Chapter XI petition except with agreement by the Fund that BSI would be paid immediately \$25,000.00 as a retaining fee and, in response to a question posed by Matheson as to what the overall fee for BSI would be, explained that, if the balance of

^{*} These were monies in addition to monies to be infused into Neisco to permit it to operate successfully and to go on a profitable basis (166, 167, 175, 176a).

the fee was to be received from Neisco, an application would be made to the Bankruptcy Court. However, if the Fund were to arrange to have third party money pay the balance of the fee, "whether it would be through Montmartre Corporation or any other corporation, or any other device that the pension fund decided to utilize in making payment of the necessary monies to my fidm (sic), that we could agree upon an additional fee of \$75,000, and I felt that a fair estimate would be \$100,000 overall as the fee for my firm." (179, 180a).

Judge Haight asked Ballon to recall exactly what was said and by whom and Ballon responded:

"I was asked what would be involved in filing and what the cost to the fund would be in going through with consummating a plan.

"I told them, and in turn they agreed and authorized me to go ahead and prepare the papers, that that would be completely satisfactory." (181a)

With respect to the retaining fee of \$25,000.00, Judge Haight asked Ballon whether there was any response from the Fund. Ballon replied:

"***--several people did respond. There was no question about the payment of the \$25,000, 'We'll arrange for that.'" (182a) (emphasis added)

Conversation at the meeting then turned to how they

(the Fund) (184a) "were going to pay the \$25,000, and at that point discussion took place that the payment could be made through the Montmartre Corporation."* (184a) Payment of the \$25,000.00 was made through Montmartre Corporation (Montmartre) by virtue of a series of five (5) notes. A Fund representative, placed in Montmartre by the Fund, to supervise, had to countersign each check in payment of each note (185,186a).

The meeting of November 5, 1969 ended with resolution of all matters discussed (190a).

B. The Meeting of November 11, 1969

The next meeting, in New York, on November 11, 1969, was between Ballon, Radom and Teitelbaum (194a). There was discussion with respect to an agreement to be drawn concerning Montmartre (194a) and, although the testimony appears at first blush to be unclear (196a), there was no relationship in transactions between Neisco and Montmartre (282-283a; 60-61a; 108a; 594-597a; In the Matter of Masmo, Inc., Bankrupt, 70 B 218, 2-1-72, pp. 68-69 [So Dist]).**

C. The Meeting of November 19, 1969

The next meeting was on November 19, 1969, in Chicago

*The Montmartre Hotel was in Miami Beach, Florida. It was part of the Horvath family (186, 187a). The Hotel was indebted to the Fund for approximately six million (\$6,000,000.00) dollars (531-532a).

**By stipulation, the full transcript of the Masmo Bankruptcy hearing minutes of February 1, 1972, pages 1-121, which were deemed admitted at trial, were not required to be produced. However, if required by the Court, they will be made available.

and was attended by Ballon, Horvath, Polish, Teitelbaum, Radom, Dorfman, Matheson, Duffey, Baron, an appraiser on behalf of the Fund, and one or two other Trustees (198a). There was again discussion with respect to the cost of a Chapter XI proceeding (199a). Ballon again pointed out that the total fee to BSI, including the \$25,000.00 retaining fee, would be \$100,000.00 (201a). The Fund representatives stated:

"It's perfectly all right if you go ahead and put this plan through, but you don't know at this point (sic) whether you can settle with creditors at 15 cents, so let us say that you can go from 250 and not beyond \$300,000 in order to confirm the entire plan." (201a)

All Fund representatives then told Ballon to go ahead with the filing of the petition (202a). BSI then commenced performance of services toward consummating the Chapter XI proceeding (202a). BSI performed all the usual and customary services and throughout the entire period of time was in constant communication with Radom, who attended virtually every court hearing in New York and who, invariably, was at Ballon's office before or after each court hearing (203a).

D. The Chapter XI Proceeding Continues -
The Fund's Involvement

During the meeting of November 5, 1969 or November

19, 1969, Ballon had been told by Dorfman, Matheson and Teitelbaum that the Fund would have representatives (overseers) in New York to supervise the entire operation of Neisco and to make certain that the Fund's interests were properly protected (205a). Ballon later learned that the two persons were Sol Eisenrod (Eisenrod) and a Mr. Rugendorf (Rugendorf) (205a). In addition to the repeated meetings with Radom, above described, there were, during the course of the Chapter XI proceeding, continual meetings between Ballon, Rugendorf and Eisenrod (206a). Rugendorf told Ballon that he was the Fund's New York representative and that he acted as the Fund's financial consultant in the New York area (210a). Ballon testified that he met or communicated with Rugendorf approximately 25 times during the course of the Chapter XI proceeding. Moreover, Radom was present at approximately one-half of those meetings; Matheson and Duffey on approximately two of the occasions; and, Eisenrod on approximately six to eight occasions (211a). The Fund was making certain that BSI earned its fee!

BSI continued to perform services for the Fund in the Chapter XI proceeding and the Fund, through its attorney at the trial before Judge Haight, conceded that BSI performed

all the usual procedures that are required in a Chapter XI proceeding (220a).*

As the Chapter XI proceeding progressed, the time came when BSI was able to prepare for consideration by the creditors a Plan for resolution of claims. Ballon, who had originally advised the Fund representatives, at the meeting in Chicago on November 5, 1969, that he felt he would be able to effectuate a settlement with creditors of 15 (\$.15) cents on the dollar (176a), had negotiated to the point where settlement was to be for 12-1/2 (\$.12-1/2) cents on the dollar. There was one particular creditor who wanted substantially more and there was a meeting attended by Radom at which Ballon suggested alternatives and at which Radom rejected Ballon's suggestions (221a). Ballon was finally instructed by the Fund, through Radom, to go ahead on a plan of 12-1/2 (\$.12-1/2) cents on the dollar to the general unsecured creditors (221, 222a).**

* Subsequently, the IRS claim was resolved (111e); BSI obtained more than sufficient acceptances from the general unsecured creditors (111e); and the Referee in Bankruptcy, after hearing, had ruled the BSI promulgated Plan to be in the best interests of creditors and had approved the Plan (248-249a).

** Ballon had testified that he felt he would be able to arrange a settlement with general unsecured creditors of 15 (\$.15) cents on the dollar (176a). The maximum amount to be paid pursuant to such settlement, he further testified, would be approximately \$75,000.00 (176a). In point of fact, the Plan as ultimately promulgated required payment to general unsecured creditors not of \$75,000.00, as Ballon had estimated, but rather, in the total amount of only \$26,000.00 (226a; 2e). This Plan was approved by the Bankruptcy Court (248-249a).

E. Collateral Matters Not Affecting
the Chapter XI Proceeding

During the course of the services being rendered by BSI with a view toward consummation of a Chapter XI proceeding, numerous other questions arose (8-11e). However, the other questions which arose had nothing whatsoever to do with the Neisco situation. The "other" questions were separate and apart from the Chapter XI proceeding and the attempts made to resolve the problems were not, other than by virtue of the fact that similar parties were involved, connected in any way with the Chapter XI proceeding (266-269a; 282-283a; 339-343a; 364-367a; 386a; 397a; 401a; and, 691a).*

F. Resolution of the IRS Claim

Negotiation and settlement of the IRS claim was effectuated by Radom and Vogel (430a).** Although negotiation of the IRS claim would normally have been handled by BSI, since the Fund was going to pay the amount negotiated, the interests of BSI and Neisco were subordinated to the interests of the Fund (430-431a). Agreement was reached resolving the IRS claim (431-434a; 111e) and duly noted in the minutes of

*A full discussion of this question is to be found herein on page 39 et sequentia.

**The Fund had originally been represented in this action by Schaeffer, Dale, Vogel & Tavrow, who apparently acted as special counsel to Radom, the Fund's attorney (13a).

the Neisco proceeding, on September 2, 1971, before then Referee Babitt (111e; 433a).*

G. Resolution of Claims of
General Unsecured Creditors

Supplementing the discussion on page ten (10) hereof, BSI obtained more than sufficient acceptances from the general unsecured creditors (111e); and the Referee in Bankruptcy, after hearing, had ruled the BSI promulgated Plan to be in the best interests of creditors and had "approved" the Plan (248-249a).**

BSI had no further obstacles to confirming the Plan.

*Page 433a, line 11, indicates a bankruptcy hearing of September 2, 1972. The year should clearly be 1971 (see page 111e, hearing of September 2, 1971).

**Once the Plan was "approved," the Fund was obligated to finance final costs.

"Q Did you believe, as a trustee, that if this plan was to be consummated, that the Fund would have to finance all of the costs?

"A That was my belief, and we were so advised by our attorneys, that this was what we could--this is what we had to look toward if the plan of arrangement were approved." (179, 180e) (emphasis added) (Examination before trial of Trustee Duffey)

Eighteen (18) months of negotiations and adjournments in the Bankruptcy Court (112e) had resulted in resolution, pending but one further ministerial act by the Fund: infusing the promised monies to finance the final costs to confirm. And this aspect, of the entire Chapter XI proceeding, should have been of little concern to BSI, and was ministerial inasmuch as the Fund had agreed to pay (finance) consummation costs (177-180e; 806a; 807a; 181a; 201a; 102a; and, 104a). But confirmation was not to be. On September 2, 1971, Vogel advised then Referee Babitt: "I was notified on Monday that the trustees had voted at their last meeting not to go forward." (113e)

H. The Fund Breaches the Contract to
Advance Final Monies - Confirmation Fails

Failure of financing for the final phase of the Chapter XI proceeding was the only obstacle which prevented confirmation (248-250a; 656a). The Bankruptcy Court was first notified of the Fund's refusal to go forward on September 2, 1971 "[a]nd after 18 months of carrying" the Fund (112, 113e). Then Referee Babitt was justifiably annoyed:

"But I am most exceedingly distressed. I do not think the Pension Fund has dealt with the court in good faith." (117e)

And in fact, the Fund's decision to walk away from its obligations had apparently occurred well over a year prior to advising the Bankruptcy Court on September 2, 1971 (83-86a; 88a). Irrespective of when the refusal became operative, it constituted a breach of contract to finance the costs of confirmation, (177-180e; 181a; 201-202a; 102a; and 104a) and contradicted specifically Duffey's examination testimony that the Fund would finance all costs of an "approved" arrangement (179-180e).

The Fund's breach of contract dictated Neisco's demise which occurred on March 22, 1972. This litigation ensued.

ARGUMENT

I.

THE DISTRICT COURT'S HOLDING, THAT THE SEVERAL TRUSTEES AND THEIR ATTORNEYS WITH WHOM PLAINTIFF ENTERED INTO CONTRACT LACKED THE REQUISITE AUTHORITY TO BIND THE FUND, IS CONTRARY TO, AND CONTRADICTED BY THE FACTS AND INDEED THE TRIAL COURT'S OWN FINDINGS OF FACT

Judge Haight's finding of fact (810a) and conclusions of law (829, 830a) that the individual Trustees (and, of necessity, their attorneys) lacked the requisite authority to bind the Fund, does not accord with the facts adduced at trial nor with the very findings of fact made by him. Subsequent to a discussion of the early meetings in Chicago,* Judge Haight, in his findings of fact, observes:

"The picture that emerges from these minutes is that of the Fund concluding, no doubt with some reluctance, to advance considerable additional monies to Neisco, but with the salvage operation to be conducted under the careful supervision of the bankruptcy court and the Fund's own legal advisors. The Fund was, naturally and properly, cost conscious in contemplating this venture; and it is only logical to assume that, when the Chapter XI alternative was first considered at the November 5 meeting with Ballon and Horvath, all elements of cost, including legal costs, would be discussed. In this context, the evidence makes it clear that the Fund would be the ultimate source of payment for legal costs in the event of a successful Chapter XI arrangement, since Neisco, in a failing condition and badly in need of transfusion, was not in a position to do so, and neither the United States nor the general creditors could reasonably be viewed as likely prospects." (806a) (emphasis added)

* Judge Haight found, on the basis of the preponderance of the credible evidence, that Ballon's testimony was correct and credible (803-808a; 828a).

On the following page, the findings of fact are as follows:

"On the subject of BSI's own fee, if it acted as attorney for the debtor-in-possession, Ballon testified that his firm would require a retaining fee of \$25,000; and that, in respect of the balance of the fee, two alternatives presented themselves: (1) if an arrangement was successfully completed, BSI could apply to the bankruptcy court for the fixing of compensation; but (2) if BSI's compensation was paid 'through third parties', such as the Fund, an additional \$75,000 would be regarded as sufficient. I accept Ballon's testimony that such a discussion was held and find accordingly.

"At the conclusion of the November 5 meeting, the Trustees present indicated to Ballon, Polish and Horvath their assent to the institution of Chapter XI proceedings." (807a).

Judge Haight has thus made findings of fact that the Fund would be the ultimate source of payment for legal costs in the event of a successful Chapter XI arrangement; that Ballon advised the Trustees what his fee would be with respect to the Chapter XI proceeding; that Trustees were at the meeting when Ballon, in response to their questions, discussed his fee; and at the conclusion of the first meeting in Chicago the Trustees present indicated their assent to the institution of Chapter XI proceedings. The authority which Judge Haight later determines to be lacking has already been established. The thrust of the findings of fact is that, if a successful Chapter XI proceeding

was arranged, the Fund would be the ultimate source of payment for legal costs. Such finding mandates that the Trustees and their attorneys present at the meetings in Chicago had authority, actual, apparent and implied, to bind the Fund to pay legal fees for a successful Chapter XI Arrangement. It is improper to determine the Trustees' authority dependent upon whether the Chapter XI Arrangement was successful. The authority to bind the Fund existed: whether the Chapter XI arrangement was successful only determines, in hindsight, whether the authority was exercised toward a beneficial end. Judge Haight, after finding authority, mistakenly "quarterbacked" on Monday morning and, although finding as a fact "authority" to contract with BSI existed, found, as a conclusion of law, that it did not exist because the Chapter XI proceeding was not consummated and because other questions concerning Horvath were not resolved.

"I find, on the evidence adduced at trial, that the Fund never intended a piecemeal settlement of the several ventures through which the Fund and the Horvaths were entangled with each other. Specifically, I reject BSI's contention that the Fund obligated itself to pay BSI's legal fees, whether or not a plan of arrangement was consummated for Neisco, and without any consideration to the resolution of the other questions involving the Fund and the Horvaths." (815-816a) (emphasis added)

The rejection of BSI's claim is not premised by

Judge Haight on lack of authority. Judge Haight finds no Fund obligation because the question of consummation and collateral matters should have been part of the deal. This reasoning is improper. If the Fund had authority to contract, the authority existed irrespective of the contract. The contract is but the result of an exercise of authority.

Discussing the merits of BSI's claims, Judge Haight, in his conclusion of law, referring to the meetings in Chicago in November, 1969, notes:

"The most that can be said for those discussions is that certain Trustees asked Ballon what the costs of a successful Chapter XI arrangement would be, including attorneys' fees; that Ballon responded to that inquiry; and that the Trustees present then told him, in effect, to go ahead. This is entirely insufficient to give rise to an express agreement, binding upon the Fund to compensate BSI, no matter what the outcome of the Chapter XI proceeding." (828-829a) (double emphasis added)

The following is noted subsequently in the conclusions of law:

"I further conclude that BSI has failed to prove a binding and irrevocable contractual obligation, on the part of the Trustees or the Fund, to furnish funds necessary to confirm a Neisco arrangement, irrespective of the overall outcome of the Fund's negotiations with the Horvaths. That conclusion is fatal to BSI's third cause of action." (833a) (emphasis added)

Judge Haight's finding is, for the reasons above

noted, improper. His negative finding is pregnant with a recognition of authority. If the Fund had authority to furnish funds to confirm Neisco and simultaneously resolve all Horvath negotiations, it had authority to act with respect to either issue.

Judge Haight's specific conclusion of law, that authority to bind the Fund was lacking (830a), is contrary to and contradicted by his own findings of fact as well as the balance of his conclusions of law. Moreover, the authority of the Trustees present at the meetings in Chicago, and their attorneys, to arrange for payment of legal fees to BSI is apparent from the pre-trial examination of Duffey.

"Q Let me understand.

Did the trustees authorize your attorneys to make these arrangements with Mr. Eisenrod and Mr. Rugendorf to perform these services?

"A Our attorneys were authorized to do anything that was necessary to protect our interests in Neisco and the Chapter XI proceeding."
(174e)

Duffey further testified:

"Q Do you recall approximately how much was required to put through the Chapter XI proceeding?

* * *

"A I am searching now, but my recollection is somewhere between five hundred and seven hundred thousand.

"Q Was there a discussion as to where that money would come from?

"A Yes.

"Q What was that discussion?

"A That the pension fund was to guarantee the cost of the administration of the plan.

"Q When you say guarantee, do you mean guarantee or do you mean pay?

"A Pay.

"Q In other words, am I correct that the trustees, if this plan was to be put through, would be financing the plan?

"A That was my understanding.

* * *

"Q Did you believe, as a trustee, that if this plan was to be consummated, that the Fund would have to finance all of the costs?

"A That was my belief, and we were so advised by our attorneys, that this was what we could-- this is what we had to look toward if the plan of arrangement were approved." (177-180e)

And further:

"The attorneys had control of the situation, and they had authority to proceed along the lines of the proposal that they had outlined to us, and if they could not achieve that plan that they were undertaking whatever action they deemed in the best interests of the trust.

* * *

"A The attorneys that were handling the case, Radom and Teitelbaum, and Mr. Vogel's firm here in New York was in constant consultation with Mr. Radom." (181-182e)

Ballon's testimony also supports the authority of the Trustees and their attorneys present at the meetings in Chicago to enter into an arrangement to pay BSI's fees.

"I was asked what would be involved in filing and what the cost to the fund would be in going through with consummating a plan.

"I told them, and in turn they agreed and authorized me to go ahead and prepare the papers, that that would be completely satisfactory."
(181a)

With respect to the initial retaining fee of \$25,000.00, Ballon was asked, by Judge Haight, whether, when he mentioned that particular figure, did anyone on behalf of the Fund respond? Ballon replied:

"Yes. Everybody--when I say everybody responded, I would say that several people probably--several people did respond. There was no question about the payment of the \$25,000, 'We'll arrange for that.'" (182a)

Ballon further testified that, at the meeting of November 19, 1969, he was again asked to enumerate what monies would be involved in the Chapter XI proceeding (200a). Ballon also reiterated that the total fee to BSI, including the \$25,000.00 retaining fee, would be \$100,000.00 (201a). And Ballon then testified that the Fund representatives told him:

"It's perfectly all right if you go ahead and put this plan through, but you don't know at this point (sic) whether you can settle with creditors at 15 cents, so let us say that you can go from 250 and not beyond \$300,000 in order to confirm the entire plan.'" (201a)

* * *

"Q Were you then given any further instructions by the fund members as far as the Chapter XI was concerned?

"A I was told to go ahead with the filing.

"Q Who told you that?

"A Mr. Teitelbaum, Mr. Matheson, everybody in the room.

"Q ***, did anybody say 'Mr. Ballon, don't go forward with it'?

"A Absolutely not." (201-202a)

As BSI proceeded with the Chapter XI proceeding, representatives of the Fund, including attorneys and financial consultants, were in frequent contact with BSI to advise as to the Fund's intentions. Judge Haight, in the midst of testimony, clearly recognized the authority of the Trustees and their attorneys to speak for the Fund, when he observed:

"This witness has testified that at a meeting with people who unquestionably spoke for the fund, he and Mr. Horvath were told--this was at the November 19 meeting--that the fund would have overseers in New York to protect the fund's financial interest in this matter and that Mr. Eisenrod and Mr. Rugendorf were identified as those overseers." (258a) (emphasis added)

The authority of the Fund, acting through its Trustees or its attorneys, was likewise recognized by then Referee Babitt. During the hearings of Neisco, Inc., debtor, No. 70-b-769, November 4, 1970, in discussing the question of resolution of the IRS claim, a question arose as to the authority of the Fund to guarantee a certain debt. Referee Babitt indicated (p. 50):

"Apparently it was represented to the Court that the Fund would accept it, and I would assume that the attorney who made such representation knows of the reach of the Fund's authority to deal with its funds."

If any question remained as to the authority of the Trustees and/or their attorneys to enter into agreement to arrange for the payment of BSI's fee, the minutes of the meeting of the full board of Trustees on September 23, 1971 effectively show that, not only did such authority exist, but that the Fund supported and had authorized the Chapter XI proceeding. As stated by Radom at the meeting of the full board on September 23, 1971:

"Back in February at the Trustees meeting, the Trustees adopted a resolution--adopted resolutions authorizing us to proceed with the funding of a plan or arrangement which was being submitted at that time in the New York Bankruptcy Court effecting Neizco (sic)." (102a)

* * *

"Our primary concern at the moment is to preserve the company and assure the company these mills will continue to operate and will produce the product they are seeking to have.

"So, to accomplish this I think we are suggesting here, as I understand it Sol, that we be permitted to proceed with the plan as approved back in February with one exception and that is that we will not under any circumstances guarantee the employment contract that might be negotiated between (sic) Neizco (sic) and Ernest Horvath." (104a)

Based upon all of the foregoing, it is crystal clear that the Fund had authorized funding a Chapter XI proceeding, including the payment of all administration costs (178e). It matters not that the parties now disagree as to whether any collateral matters were to be resolved during the Chapter XI proceeding; authority to contract with BSI to consummate a Chapter XI proceeding is overwhelmingly obvious and Judge Haight's conclusions to the contrary are not supported by the facts.

ARGUMENT

II.

THE DISTRICT COURT'S HOLDING, THAT THE FUND WAS NOT OBLIGATED TO FURNISH FUNDS NECESSARY TO CONFIRM AN ARRANGEMENT FOR NEISCO, INCLUDING PAYMENT OF BSI'S LEGAL FEES, IRRESPECTIVE OF THE FUND'S NEGOTIATIONS WITH THE HORVATHS, IS NOT SUPPORTED BY THE FACTS

BSI's third cause of action (27-29a) alleges, in substance, a breach of contract by the Fund in failing to furnish funds necessary to confirm the Chapter XI proceeding (801a). Judge Haight summarily disposed of this cause of action in his conclusions of law (833a), as follows:

"I further conclude that BSI has failed to prove a binding and irrevocable contractual obligation, on the part of the Trustees or the Fund, to furnish funds necessary to confirm a Neisco arrangement, irrespective of the overall outcome of the Fund's negotiations with the Horvaths. That conclusion is fatal to BSI's third cause of action." (emphasis added)

Analysis of this conclusion indicates that Judge Haight found a binding and irrevocable contractual obligation, on the part of the Fund, to furnish funds necessary to confirm the Neisco Arrangement, but as part and parcel of such obligation, the "other" negotiations with the Horvaths had to be

resolved.* If this were not so, no need would there be for the words:

"irrespective of the overall outcome of the Fund's negotiations with the Horvaths. That conclusion is fatal to BSI's third cause of action."

Judge Haight has found that the Fund was bound to furnish funds necessary to confirm the Neisco Arrangement contingent upon resolution of the Fund's negotiations with the Horvaths. Simply, he found that the Fund did bind itself, contractually, to furnish funds necessary to confirm the Neisco Arrangement, but only as part of a contract that required resolution of "other" matters. Judge Haight found that, since the "other" matters were not resolved, the Fund was not bound to furnish funds which, concededly, would have permitted consummation (248-250a, 656a).

Judge Haight's finding of a contractual obligation on the part of the Fund to furnish funds necessary to confirm the Neisco Arrangement is correct. His findings, that conditions were attached to such contract, are not correct and not supported by the evidence presented at trial.

*

Authority for the Trustees and their attorneys, on behalf of the Fund, to enter into the contract, is discussed herein at page 16 et sequentia.

A. The Fund Was Contractually Obligated
to Furnish Monies Required to Confirm
the Neisco Arrangement

The testimony and other evidence adduced at trial leaves no doubt that the Fund was contractually obligated to furnish funds necessary to confirm the Neisco Arrangement. Duffey testified at examination before trial to the obligation:

"Q Do you recall approximately how much was required to put through the Chapter XI proceeding?

* * *

"A I am searching now, but my recollection is somewhere between five hundred and seven hundred thousand.

"Q Was there a discussion as to where that money would come from?

"A Yes.

"Q What was that discussion?

"A That the pension fund was to guarantee the cost of the administration of the plan.

"Q When you say guarantee, do you mean guarantee or do you mean pay?

"A Pay.

"Q In other words, am I correct that the trustees, if this plan was to be put through, would be financing the plan?

"A That was my understanding.

* * *

"Q Did you believe, as a trustee, that if this plan was to be consummated, that the Fund would have to finance all of the costs?

"A That was my belief, and we were so advised by our attorneys, that this was what we could-- this is what we had to look toward if the plan of arrangement were approved." (177-180e)

Radom's testimony on direct examination acknowledges the Fund's obligation to make funds available:

"I want to make it abundantly clear that if the program or plan was put into effect and consummated that it was certainly contemplated that included in the funds to be made available would be costs and fees of administration."
(555a)*

During cross examination, Radom testified, with respect to funding the Neisco Arrangement:

"Q And did the representatives of Ballon, Stoll & Itzler indicate to the Court where it was expected those funds were coming from?

"A The Court was so advised, yes.

"Q And who did they say?

* * *

"THE COURT: He can answer the question. It is a question of a subject of discussion which came up before the bankruptcy judge. I think Mr. Radom recollects it.

"THE WITNESS: I recollect it very well.

"Q Yes.

"A That was that if a plan were formalized, adopted by creditors, confirmed by the Court,

*This and the following testimony lends further support to the argument that the Trustees and their attorneys were authorized to enter into contract with, or for the benefit of, BSI and contradicts Radom's earlier testimony (535a) that the Trustees and their attorneys with whom contract was entered into in 1969-1970 did not have authority to bind the Fund.

but bearing in mind these other collateral issues which had not been resolved, but assuming all these things took place, it was contemplated that the Pension Fund would provide the required monies to take care of the unsecured obligations, to the extent indicated, take care of the tax obligations, to infuse money to take care of administration costs and expenses, including the fees of Ballon et al., if the plan was consummated.*

"Q Let's just hold on to that for a second, if we may.

Would you say that that was an understanding between the Fund and Ballon & Itzler?

* * *

"A (continuing) In order to obtain a confirmation by the Bankruptcy Court one must--a debtor company must make a deposit. That deposit includes enough money to pay administration expenses and fees. It was always contemplated that these funds would be made available, providing everything was settled--it was not a piecemeal approach, but everything else was settled, and a final order of confirmation was entered, then the Pension Fund, under those circumstances, would be (sic) provided the funds required." (570-571a) (emphasis added)

Radom continued (575-576a):

"A There was no direct understanding between the Pension Fund Trustees and Ballon et al. We undertook to provide the funds, if certain things occurred, to Neisco. The obligation to pay Ballon was Neisco's and not that of the Pension Fund Trustees.

"Q Okay, now we are getting even closer.

* The question of whether, as alleged by Radom, other issues had to be resolved prior to the Fund advancing funds to consummate the Neisco proceeding, is discussed herein at page 39 et sequentia.

" Do I understand now--let me see that I don't characterize it incorrectly, do I understand then that you will concede in open court there was an understanding reached that the Fund would give the money to Neisco, who in turn would pay the bills of administration, if a plan were confirmed; is that the understanding?

"A If you add to that the -- the settlement of the other issues as well, the answer is yes.

"Q All right. So to that extent, at least, and as you have further reserved about it, there was an understanding?

"A Well, there was no question, sir, that there was a commitment made to the Court --." (emphasis added)

With specific reference to whether BSI looked to the Fund for compensation, Radom testified (579a):

"If you are saying did they expect to be compensated out of the Chapter Eleven proceeding if successful, the answer is yes, and we were to provide the funds, speaking about the Pension Fund." (emphasis added)

Radom made clear that the Fund intended to fund if the Neisco Arrangement was confirmed:

"Q And you already had in open court, as you indicated the minutes show, said that it was the intention of the Fund to fund the plan if it was confirmed; is that correct?

"A Well, if the pieces can be put together, yes."
(618a)*

*Despite this continuing testimony, Radom had denied the authority of the Trustees to contract to fund (535a).

The testimony of Polish, during cross examination concerning the Chicago meeting in November, 1969, evidences the Fund's obligation:

"Q Did anybody on behalf of the fund say in words or in substance, 'We will fund any plan that is promulgated'?"

"A In substance, yes.

"Q Who said it?"

"A They were not concerned--Teitlebuam (sic) said, 'File it. Don't worry about it. We will work it out the best way for you to work it out.'" (716a)

In response to a question by Judge Haight as to what was said by the Fund representatives at the Chicago meeting, Polish responded:

"They said they felt they had to help us. They had to fund--they had to give us the money to keep going to put this company back on its two feet." (719a)

The following is recorded on Polish's redirect testimony:

"Q On November 5, 11 and 19, were you present?"

"A I was present substantially all the time on the 5th and the 19th. On the 11th, part of the meeting was going on in my office, part of the meeting was going on in Mr. Horvath's office, I think they were meeting over in Mr. Ballon's office sometimes. There were people moving through our offices.

"Q On the 5th and the 19th did they discuss how much it was going to cost?

"A Yes.

"Q Did Ballon tell it to them?

"A Yes.

"Q Did he go over each detail?

"A I believe so.

"Q Was that supposed to be a hard and fast figure?

"A This is what it was estimated it would cost, what he would charge, and what the other things would be.

"Q As a result of that discussion what did they tell him?

"A 'Go ahead.' I think they did the same damn thing in New York around the 11th when they were developing the cash flows." (740, 741a)

Ballon's testimony also evidences the Fund's obligation to fund or finance the Neisco Arrangement. At the meeting of November 5, 1969:

"I was asked what would be involved in filing and what the cost to the fund would be in going through with consummating a plan.

"I told them, and in turn they agreed and authorized me to go ahead and prepare the papers, that that would be completely satisfactory." (181a)

Ballon further testified that, at the meeting of

November 19, 1969, he was again asked to enumerate what monies would be involved in the Chapter XI proceeding (200a). Ballon also reiterated that the total fee to BSI, including the \$25,000.00 retaining fee, would be \$100,000.00 (201a). And Ballon then testified that the Fund representatives told him:

"It's perfectly all right if you go ahead and put this plan through, but you don't know at this point (sic) whether you can settle with creditors at 15 cents, so let us say that you can go from 250 and not beyond \$300,000 in order to confirm the entire plan."
(201a)

* * *

"Q Were you then given any further instructions by the fund members as far as the Chapter XI was concerned?

"A I was told to go ahead with the filing.

"Q Who told you that?

"A Mr. Teitelbaum, Mr. Matheson, everybody in the room.

"Q ***, did anybody say 'Mr. Ballon, don't go forward with it'?

"A Absolutely not." (201-202a)

Although Ronald S. Itzler (Itzler), a partner in BSI, was not present at any meeting up until the time when the Neisco petition was filed (379-380a), he did attend meetings subsequent thereto at which time Fund representatives stated that "the plan would be funded by the pension fund."

(383a). Radom, on behalf of the Fund, indicated that the Fund "would finance the entire plan, including the necessary administration expense." (385a) However, Itzler himself did not discuss funding with Radom (391a). But at meetings attended by Itzler, funding was discussed (383, 385-395, 397-398a) by Fund representatives Radom, Eisenrod, Matheson, Rugendorf, and Teitelbaum.

The minutes of the meeting of the full board of Trustees on September 23, 1971 unambiguously show that the Fund had earlier authorized funding for the Chapter XI proceeding. As stated by Radom at the meeting of the full board on September 23, 1971:

"Back in February at the Trustees meeting, the Trustees adopted a resolution--adopted resolutions authorizing us to proceed with the funding of a plan or arrangement which was being submitted at that time in the New York Bankruptcy Court effecting Neizco (sic)." (102a)

* * *

"Our primary concern at the moment is to preserve the company and assure the company these mills will continue to operate and will produce the product they are seeking to have.

"So, to accomplish this I think we are suggesting here, as I understand it Sol, that we be permitted to proceed with the plan as approved back in February with one exception and that is that we will not under any circumstances

guarantee the employment contract that might be negotiated between (sic) Neizco (sic) and Ernest Horvath." (104a)

One further point deserves specific note. Judge Haight made reference to a letter from Radom, dated February 18, 1970, to Ballon (244e), responding in part to Ballon's letter of February 3, 1970 (323e) to Radom. The third paragraph of Radom's letter is as follows:

"I know of no means by which the Pension Fund can sanction payment of fees to your offices, as suggested in your February 3rd letter."

Judge Haight interpreted the quoted language to refer to services being performed by plaintiff with respect to Neisco. However, a review of Ballon's letter to Radom of February 3, 1970 indicates that Judge Haight misapprehended Ballon's letter. The second paragraph of Ballon's letter is as follows:

"I promised to advise you as to the fees we would require in order to enable us to file the remaining Petitions in Bankruptcy. I frankly believe that \$5,000 would be an absolute minimal fee therein."

Since it is undisputed that the petition in Bankruptcy with respect to Neisco was filed in November 1969, it is obvious that the second paragraph of the Ballon letter was referring to the petition with respect to Masmo, Inc.

(Masmo).^{*} Ballon's cross examination testimony is noteworthy:

"Q Did you ever receive a letter from Mr. Radom, addressed to you personally, in which he said that the pension fund could not sanction the payment of fees to your office directly?

"A Did I receive such a letter?

"Q Yes.

"A Yes. I asked him when--when the pension fund asked me to file a petition in bankruptcy for Masmo, I asked for a \$5,000 fee at the time, to file a voluntary petition for Masmo, and in a very lengthy letter, in one of the sentences in the letter, Mr. Radom said that he--he didn't see how the fund could do this, or couldn't make payment (sic).

"Q Is this the letter you have reference to, February 18, 1970?

"A 'I know of no means by which the pension fund can sanction payments of fees to your office as suggested in your February 3rd letter.'

That was in response to my letter of February 3rd where I asked for the \$5,000 in order to file a voluntary petition in bankruptcy in Masmo. Eventually, the fund did arrange to have those funds paid to my offices, and I did file the voluntary petition in bankruptcy for Masmo."

It is apparent that, not only did Judge Haight misinterpret the import of the Ballon and Radom letters, but he failed to take note that the requested payment was subsequently

^{*}Masmo was a related corporation. By stipulation, the transcript of hearing minutes for Masmo (70 B 218) of February 1, 1972, pages 1-121, which were deemed admitted at trial, were not reproduced. They will, if required, by the Court, be made available.

arranged by the Fund.*

Unquestionably, the Fund was contractually obligated to furnish monies to confirm the Neisco Arrangement. That such obligation was not related to "other" matters is next considered.

*Testimony was never adduced by the Fund to refute Ballon's testimony of payment.

B. The Fund's Contractual Obligation
to Furnish Monies Required to Con-
firm the Neisco Arrangement Was
Not Dependent Upon Resolution of
"Other" Matters

Judge Haight resolved all factual issues relating to Ballon's discussions in Chicago in November 1969 in favor of BSI (828a). Ballon's testimony was clearly that the various problems "did not hang together" and that the "other" problems which arose during the course of the Chapter XI proceeding were separate and apart from the Neisco situation.

1. Ballon's Testimony

During cross examination, Ballon testified as follows:

"Q As a matter of fact, what the fund wanted to accomplish was to sort of straighten out its affairs with the Horvaths and clean them all up, isn't that the gist of that meeting, what it was all about?

"A No." (266,267a)

* * *

"Q Didn't all of these problems hang together, that the fund wanted to dispose of all of them as a complete settlement with the Horvaths, not one by one piecemeal?

"A No." (268a)

With respect to BSI's Exhibit 5 (8-11e), a letter dated April 8, 1970, from Ballon to Radom, Ballon testified:

"The other questions arose during the course of the Chapter XI proceeding and had nothing whatsoever to do with the Neisco situation, and were

separate and apart from that, and it was an attempt being made to resolve other problems during the course of this that were not connected in any way." (269a)

Discussing the alleged effect of the Ernest Horvath consultant agreement on the Neisco Arrangement, Ballon testified:

"That had nothing to do with the Neisco plan of arrangement, the terms of which were approved or agreed upon between various people in the fund and myself." (282, 283a)

And, after a further partial question, Ballon continued:

"* * * these are separate and apart transactions. They had nothing to do with one another." (283a)

The Fund's counsel then read from Ballon's examination before trial, attempting to show inconsistencies. Judge Haight apparently did not find such inconsistencies, for he noted:

"I perceive no inconsistency yet, Mr. Schwartz, do you, with the testimony given on this trial?" (286a)

The Fund's counsel continued to attempt to elicit testimony tying all matters together.

"Q This business of Ernest Horvath being employed by Neisco and the employment being guaranteed by the fund, was a matter which didn't exist in the original conferences between you and the fund back in November of 1969, did it?

"A No.

"Q Wasn't it a fact that the Horvaths insisted that unless they got such an employment agreement, there would be no deal at all with respect (sic) to Neisco?

"A No, you are taking it out of context again.

* * *

"Q Did they insist that if Ernest didn't get this employment agreement and guarantee that there would be no deal at all among the fund and the Horvaths?

"A No. As a matter of fact, we were down to confirmation in the plan in Neisco. It had no relevance in the matter at all.

* * *

"Q Are you telling us that the Neisco reorganization was not affected by this agreement?

"A That's what I just said.

"Q Are you telling us that the Neisco arrangement would have been acceptable to the Horvaths if this agreement weren't signed?

"A Yes." (339, 340a)

Although Ballon acknowledged that the Montmartre situation would not have been resolved, he remained adamant in his testimony that the matters did not stand or fall together.

"Q Wasn't it also because the entire package was not resolved, not only Montmartre but Montmartre, John Allan and Neisco and the lease problem and the life insurance problem, those all hung together, didn't they?

"A No, Mr. Schwartz. You persist in attempting to put them together, and I persist in responding to you affirmatively that one had no relation to the other.

"Q By not--

"A The Neisco situation stood on its own foot. And by that time it was to be acquired, owned and operated by Mr. Eisenrod, who was assuming the liability for Neisco to the Teamsters Fund.

" On the contrary, and separate and apart from that, were all the other negotiations whereby Mr. George Horvath was going to be operating the Montmartre under an extension of time with the mortgage, with the reduction of interest and various other factors that were involved there.

"Q Were the Horvaths willing to transfer the Neisco stock to the fund or to Eisenrod without getting the employment agreement by Ernest?

"A They were going out of there, that's right.

* * *

"Q Who had agreed to it?

"A The Horvaths. That is whom you asked me about, wasn't it?

"Q They agreed to transfer the Neisco stock without getting the employment agreement?

"A That is correct." (341-342a)

On re-direct testimony, Ballon testified, with respect to a question as to whether he was to perform services in relation to the Montmartre and the Masmo matter:

"A No. That was a side issue. The problems involving Montmartre were discussed, but they have no relevance whatsoever to the Neisco situation. In other words, they were separate and apart.

"Q Did anybody on behalf of the fund at that time, or subsequent to that time, ever say to you, words to this effect, 'Mr. Ballon, if we can't solve Montmartre, if we can't solve Masmo,

if we can't solve Ernest Horvath's contract, there is going to be no funding of the Neisco matter.'?

"A No." (365,366a)

* * *

"Q Did the fund at any time through their attorneys, through Mr. Radom, through any trustee, ever say in court that the reason we are not going to go forward with the funding of the Neisco plan was because we couldn't properly settle the IRS claim?

"A Because what?

"Q Properly settle the IRS claim.

"A No.

"Q * * * Did they say that they are not going to go forward because they couldn't work out the contract with Ernest Horvath?

"A No.

"Q Did they ever say they wouldn't go forward with the settlement because of some problems with Montmartre?

"A No.

"Q Did they say that they couldn't go forward because of some problems with Masmo?

"A No." (366, 367a)

2. Itzler's Testimony

Itzler's testimony was, in substance, similar to that of Ballon, Itzler testified that, at the first meeting following the filing of the petition, there were discussions concerning the funding of the Chapter XI proceeding (382, 383a); that the Fund

indicated they would finance the Plan (385, 386a); that there was no controversy about this fact (386a); and that there was no statement made by any Fund representative that the understanding was contingent in nature (385a).

"Q Was there any discussion about this understanding being tied to the successful completion of negotiations on subjects relating to other companies that may be--that hage (sic) been companies of Horvath?

"A None whatsoever.

"Q Were the discussions in your presence concerning Montmartre, Masmo, Ernest Horvath and the Internal Revenue Service?

"A WEre (sic) there discussions? Yes, there were.

"Q Were any of those discussions made a condition to the understanding that you have just described that was reached in the Neisco matter?

"A No." (386a)

The next meeting attended by Itzler was April 6, 1970. After testifying (394a) that there were discussions concerning the funding of the Plan, and that such discussions took place at every meeting of this nature, the following question was recorded:

"Q Now, Mr. Itzler, at this point in time, was anything raised concerning the fact that as a condition precedent to the Neisco plan being funded, the administrative expenses being paid,

that there would be required some work on Masmo, Montmartre or Horvath and the IRS?

"A No."

After testifying that what transpired was substantially similar to what had transpired at prior meetings involving the same parties, Itzler testified as follows:

"A There was considerable discussion with respect to the Neisco plan, how it would be promulgated. There was discussion with respect to Montmartre, George Horvath's continuation or non-continuation, Ernest Horvath's continuation or non-continuation. Discussion with respect to various insurance policies. Discussions with respect to a company called John Allan Fibres. Discussion with respect to a company called Masmo. Discussion with respect to Montmartre." (400a)

After further testimony, stating that the funding of the Plan was also discussed, the testimony was as follows:

"Q Now, Mr. Itzler, you have indicated that there were also discussions at this meeting relating to Masmo, the Horvaths, Internal Revenue, Montmartre, etc. Were those also discussions that were held to (sic) prior meetings that you already testified to?

"A Those discussions were covered at substantially every meeting.

"Q And at this meeting, which you have just described, did anybody on behalf of the fund say that the resolution of those discussions concerning Masmo, Montmartre, the Horvaths, the insurance policies, things like that, were in any way related to their participation in the funding of the Neisco proceeding.

"A That was never said.

"Q How about as far as their payment of administrative expenses in the Neisco proceeding?

"A That was never said.

"Q How about in all the previous meetings where this conversation took place?

"A It was never said." (401a)

3. Polish's Testimony

The testimony of Ballon and Itzler was substantiated by Polish's testimony. Discussing the meeting in Chicago on November 4, 1969 and relating to the meeting on November 19, 1969, and with specific reference to the funding of the Plan, the following is noted:

"Q Did Mr. Ballon give them any figures as to the funding of the plan?

"A My recollection is that he did.

* * *

"Q Was there any specific discussion by Mr. Ballon as to the general overall funding of the plan?

"A Yes. * * * I think Mr. Matheson was concerned about what the costs would be.

"Q Did Mr. Ballon respond to Mr. Matheson's query?

"A Yes, he did. * * * He wanted a \$25,000 retainer.

" He was asked what he felt his ultimate fee would be.

" He felt it probably would be around \$100,000, and suggested that he would set that fee if they made an independent agreement with him.

"Q Were any arrangements made concerning the method of paying Mr. Ballon the \$25,000?

"A The fund had--at that point the Mt. Clemens Corp. group of companies had essentially two operating entities, both of whom had substantially all of their assets pledged to the pension fund.

" The other asset was a hotel in Miami. And they agreed that of the hotel's moneys, some \$25,000 in the form of notes could be delivered to Mr. Ballon.

"Q Was Mr. Radom in the room when this agreement was made?

"A I believe so.

* * *

"Q Now, did anybody in the room raise any objections concerning the payment--the funding of the plan and the amounts that would be necessary for administration expenses, including Mr. Ballon's legal fee.

"A To my recollection, no."

* * *

"Q Were there any conditions as to under what circumstances the money or the funding would be made?

"A Not to my recollection." (685-688a)

Polish's testimony was that, at the meeting on November 19, 1969, there were further discussions concerning the funding expenses and that Ballon's fee was again discussed and that no objection was made thereto.

"Q Was any instruction given to Mr. Ballon in your presence?

"A They asked him to file-- * * *

"Q On the 19th, was there any discussion about Mr. Ballon's fee being conditioned upon any event in the future?

"A I think it was conditioned upon the filing of a Chapter XI.

"Q Anything else?

"A Not to my knowledge.

"Q Was anything said about the payment only on confirmation of a plan?

"A No.

"Q What about the interrelation of the Horvath companies. Was anything said about that?

"A Not that I recall. * * *" (689, 690a)

And further:

"Q Was there any discussion about working out some contract for Ernest Horvath?

"A Not then.

"Q Was there any suggestion that there would have to be something done about Masmo before the fund could fund the plan?

"A No, we were concerned about it. We were concerned about the viability of Masmo and the effect of filing a Chapter XI.

" They said 'No, don't worry about it. This is the way to do it. This is the way it will turn out best for you.'

"Q Was there any talk about something happening at Montmartre with the filing of the plan?

"A No. But simultaneously they were in discussion about Montmartre, the situation of the loans to Montmartre.

"Q Was there any discussion about working out any kind of a specific deal with the Internal Revenue Service as a condition of the approval of the plan?

"A No." (691a)

On re-direct testimony the following questions and answers were noted:

"Q By the way, Mr. Schwartz asked you a number of questions regarding the interrelation of companies, and I know I have asked you this question once, I want to ask it again--at the time that the promise that you have indicated was made by the fund in relation to the funding of the Neisco bankruptcy, were there any restrictions placed on that promise by the fund members or their representatives in relation to the solving of the so-called other problems in the Horvath family of companies?"

After an objection by defendants' counsel, the following question was propounded:

"Q Was anything said about such restrictions?

"A No." (743, 744a)

The weight accorded by Judge Haight to BSI's supporting testimony must have taken into consideration the following:

"THE COURT: Mr. Polish, at the November 5 meeting in Chicago, do you specifically remember

Mr. Ballon referring to a \$25,000 retainer in response to an inquiry from a representative of the fund on the subject of cost?

"THE WITNESS: I remember specific conversations with respect to the \$25,000. The reason I am fairly certin (sic) about it is that I knew they were contemplating restricting monies coming out of Montmartre, and we knew that this money had to come out of Montmartre over a period of time during the season. It couldn't come in November. It would have had to come after Christmas because the--the season would generate dollars. So It (sic) had to be Montmartre and they had to be aware of it and had toagree (sic) with it.

"THE COURT: You specifically recall that \$25,000 would be what Mr. Ballon would require as a retainer?

"THE WITNESS: Yes.

"THE COURT: You also specifically recall that within the context of the overall costs of Chapter XI, Mr. Ballon mentioned a further \$75,000 that he would require in respect of fee?

"THE WITNESS: Yes." (745-746a)

4. Testimony Adduced by BSI From
Fund Records and Fund Witnesses

The Fund's records substantiate that the "other" matters were not conditions, resolution of which were required, precedent to the Fund's obligation to furnish monies required to confirm the Neisco Arrangement. The minutes of the November 17, 1969 Steering Committee meeting of the Trustees acknowledge that Neisco and Montmartre stood independent of each other.

"MR. TEITELBAUM: In regards to Neisco and the Momart (sic), our understanding is that we are to divide out the two problems--on the one hand, Momart (sic), and on the other hand, Neisco." (60a)

Radom testified (594a) that, inter alia, the problem with respect to the Horvath insurance policies had to be worked out before the Fund would go forward with funding the Neisco Arrangement. Moreover, the Fund further contended that all "other" matters, including Neisco and Masmo, were tied together and had to be settled before the Fund would provide final Neisco funding. Therefore, the minutes of the November 17, 1969 Steering Committee meeting, separating and "dividing out" Neisco and Montmartre, are interestingly inconsistent with such allegations and the minutes of the Trustees meeting of June 23, 1970 (74-82a), separating Neisco, Montmartre and the Horvath insurance policies, are likewise interestingly inconsistent. The discussion at the June 23, 1970 meeting was initially concerned with Neisco and the Horvaths. Radom stated that the Trustees would be well advised to acquiesce in Horvath's request to have insurance policies transferred to him. Radom then began a discussion with respect to Montmartre. He indicated that Montmartre intended to request further consideration from the Fund and was then asked by Trustee Spickerman:

"I have a question now tied in with this. You mentioned these insurance policies for three million dollars. Are they tied in with this?

"MR. RADOM: No, sir." (79, 80a)

At the Trustees meeting of September 23, 1971 (102 - 111a), Radom again made clear the distinction between Neisco and Montmartre.

"Neizco (sic) is a subsidiary of other companies and I might have submitted to you at one time, the entire corporate structure involving 15 or 16 different companies. It is desired here to carve it out. This has nothing to do with Montmartre. Montmartre is still the subject of foreclosure action of one kind or another."
(108a)

Contrary to the Fund's present stance, Masmo and Neisco are also distinct. On pages 68-69 of the bankruptcy proceeding of Masmo, during the meeting held on February 1, 1972 (see page 8 hereof for full citation), then Referee Babitt asked as follows:

"Does the contents of this sale in Masmo make any difference?

"MR. ITZLER: As I understood it, Mr. Radom stated the last time that if he were unsuccessful in having the trustee accept his bid or eventually accept the bid by the Pension Fund, then the Neisco matter could not be confirmed.

"MR. RADOM: I might have made that statement. I want to clarify it this morning, that one has nothing to do with the other.

"THE REFEREE: Could I confirm Neisco if this sale does not go through to you?

"MR. RADOM: Yes, your Honor.

"THE REFEREE: I could?

"MR. RADOM: Yes, your Honor.

"THE REFEREE: I misunderstood." (595-597a)
(emphasis added)

The claimed interrelationship of "other" matters, by virtue of which the Fund seeks to avoid its contractual liability to furnish funds required to confirm the Neisco Arrangement, is a "red herring" manufactured by the Fund. Since it is established that the Fund was contractually obligated to furnish monies required to confirm the Neisco Arrangement (see page 26 hereof, et sequentia) and since such obligation was not dependent upon resolution of "other" matters, Judge Haight's dismissal of BSI's third cause of action, and his judgment thereon in favor of the Fund, are improper.

ARGUMENT

III.

THE DISTRICT COURT FAILED TO DRAW
INFERENCES AGAINST THE FUND BASED
UPON THE FUND'S FAILURE TO CALL
WITNESSES LIKELY TO SUPPORT THE
FUND'S POSITIONS

Duffey and Matheson, who had been examined before trial (134-232e), as well as other Trustees who participated in the Chicago and/or New York meetings late in 1969 and early in 1970, were persons that the Fund "could and should have called as" witnesses (Overton v New York City Housing Authority, ___AD2d___, 388 NYS 2d 598, 599 [1st Dept, 1976]). Surprisingly, such parties, who were present during the contractual negotiations, failed to appear in court to testify. Since BSI's supporting testimony was positive, direct and accepted by Judge Haight, BSI's testimony should have been taken most strongly against the Fund, which was in a position to contradict it by parties present at the negotiations, but failed to do so. In failing to draw inferences contrary to the interests of defendants, Judge Haight apparently overlooked the rule

"that where an adversary withholds evidence in his possession or control that would be likely

to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits." Noce v Kaufman, 2 NY 2d 347, 353; 161 NYS 2d 1, 5; 141 NE 2d 529, 531.

BSI's evidence made clear that the Fund had contractually obligated itself to furnish monies required to confirm the Neisco Arrangement irrespective of whether "other" matters were resolved. Portions of the Fund's records and Radom's testimony substantiate BSI's position. The Fund, controlling other witnesses who would have presumably supported its version of the cause, failed to present such witnesses. Based upon such failure and upon BSI's evidence in the record, Judge Haight should have drawn conclusive inferences that the Fund's obligation to fund the Neisco Arrangement was not conditioned upon resolution of "other" matters between Horvath and the Fund. Judge Haight's failure to draw such inferences was error.

ARGUMENT

IV.

THE FUND'S UNWARRANTED REFUSAL TO HONOR ITS CONTRACTUAL OBLIGATION TO PROVIDE MONIES NECESSARY TO ENABLE PLAINTIFF TO CONSUMMATE A CHAPTER XI PROCEEDING DIS-PENSED WITH PLAINTIFF'S OBLIGATION, AS A CONDITION PRECEDENT TO PAYMENT, TO CONSUMMATE A CHAPTER XI PROCEEDING

It is uncontested that, if the Fund had financed the final phase of the Chapter XI proceeding, the Plan promulgated by BSI would have been confirmed (248-250a, 656a). Absence of funding for the final phase was all that prevented confirmation: the Attorney General had approved resolution of the I R S claim (111e); and BSI had more than sufficient acceptances from the general unsecured creditors (111e).^{*} At the threshold of consummation, the Fund could not, without liability, refuse to provide final monies to fund consummation and thereby defeat BSI's right to recover the agreed upon compensation. The Fund was contractually obligated to provide monies to consummate the proceeding, and could not abrogate its obligation unilaterally. Its failure to advance monies necessary to consummate the proceeding, when all other matters relating to the proceeding had been resolved, excused BSI from its obligation of full performance - to consummate a Chapter XI proceeding - and enabled BSI to sue for damages.

"It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes

^{*} The Referee in Bankruptcy, after hearing, had ruled the Plan to be in the best interests of the creditors and had approved the Plan (248-249a)

the doing of some act on the part of the other prior thereto, that the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or where rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency had occasioned, against the defaulting party. (Cross v. Beard, 26 N.Y. 85, 88.)" Mansfield v N.Y.C.&H.R.R.R.C.O., 102 NY 205, 211, 6 NE 386.

The contract whereby the Fund agreed that BSI's fee was to be paid if a successful Chapter XI proceeding was consummated must be read to permit BSI to prosecute the proceeding without hindrance from the Fund. This proposition accords with the requirement of good faith and fair dealing implied in all contracts. As observed by the New York Court of Appeals in Patterson v Meyerhofer, 204 NY 96, 100, 101, 97 NE 472:

"In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part.

"This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its non-performance or from interposing it as a defense to an action upon the contract (Young v. Hunter, 6N.Y. 203, Barton v. Gray, 57 Mich. 622, and cases there cited).

"Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing." (Gay v. Blanchard, 32 La. Ann. 497)."

Consequently, the Fund's attempt to rely on BSI's

failure to consummate a proceeding, where the Fund itself frustrated and prevented such performance, is misplaced. It is fundamental that a party may not prevent the occurrence of a condition precedent upon which its liability depends and then take advantage of the condition (5 Williston on Contracts, 3rd Edition, §677). Williston cites Gulf Oil Corp. v American Louisiana Pipe Line Company, 282 F2d 401 (6 Cir., 1960), for the proposition that:

"Where a liability under a contract depends upon a condition precedent one cannot avoid his liability by making the performance of the condition precedent impossible or by preventing it."

In Allen v Hyland, 30 Misc 2d 632, 215 NYS 2d 587, (Sup Ct, Erie Cnty, 1961), affd, ___ App Div___, 222 NYS 2d 1023(1) (4th Dept, 1962, memo), the Court, citing Amies v Wesnofske, 255 NY 156, 174 NE 436, held as follows:

"Although a promise to pay upon the happening of an event does not become absolute until the happening of the event, an inference may be drawn that the parties did intend that payment should be made even if the event does not occur, where the happening of the event is under the control of the party obliged to pay. See: Mascioni v. I.B. Miller, Inc., 261 N.Y. 1, 4, 6, 184 N.E. 473, 474. Thus, waiver results from active conduct of the conditional promisor, who prevents fulfillment of the condition, which becomes eliminated, making the promise absolute." 215 NYS 2d p 591.

The New York Court of Appeals in Kooleraire Serv. & I. Corp. v Board of Education, 28 NY 2d 101, 106, 268 NE 2d 782, 320 NYS 2d 46, 48 enunciated the general rule:

"The general rule is, as it has been frequently stated, that a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition. In *Stern v. Gepo Realty Corp.*, 289 N.Y. 274, 277, 45 N.E. 2d 440, 441, it was observed 'one may not take advantage of a condition precedent, the performance of which he himself has rendered impossible.' See, also *Sibbald v. Bethlehem Iron Co.*, 83 N.Y. 378, 384; *Vandegrift v. Cowles Eng. Co.*, 161 N.Y. 435, 443, 55 N.E. 941, 943." (See also, *Imperator Realty Co. v Tull*, 228 NY 447, 457, 127 NE 263).

BSI performed its contractual obligations except as prevented by the Fund from so performing. The Fund, having prevented confirmation of the Chapter XI Plan promulgated, cannot take advantage of such failure to prevent BSI from recovering the agreed-upon contractual compensation.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed and vacated and judgment should be directed in favor of BSI, as demanded in BSI's third cause of action, with costs in favor of BSI.

Respectfully submitted,

BALLON, STOLL & ITZLER
Attorneys for Plaintiff-Appellant

PHILIP SHERWOOD GREENHAUS
of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

VINCENT PANZA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2002 ELLIS AVE.
BRONX, NYC

That on the 25th day of MARCH, 19 77,
deponent personally served the within BRIEF FOR PLAINTIFF-APPELLANT

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

GREENBAUM, WOLFF & ERNST
Attorneys for Defendants-Appellees
437 Madison Ave.
New York, N. Y. 10022

Vincent Panza

Sworn to before me this

25th day of MARCH, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978